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No. _____

In The

Supreme Court of the United States

October Term, 1997

DALRIE A. BERG, D.O.,

Petitioner,

v.

JACK SHAPIRO, HUMANA HOSPITAL MOUNTAIN VIEW, INC., JOHN A. HOFFMAN, THOMAS J. BLANCHARD and DOES 3 through 10,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The State Of Colorado

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether professional review of a physician by a private hospital is state action for purposes of 42 U.S.C. § 1983, when the state utilizes, authorizes, supervises and immunizes such professional review and the state's appellate courts have concluded that peer review committees are arms of the state.

LIST OF PARTIES

There are no parties who are not named in the caption.

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JURISDICTION

The judgment of the trial court was entered on September 19, 1995. The judgment of the Colorado Court of Appeals was entered on April 17, 1997, and the Colorado Court of Appeals denied a timely petition for rehearing on May 29, 1997. The Supreme Court of Colorado denied certiorari review on December 15, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1994).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 (1994) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Colo. Rev. Stat. § 12-36.5-103 (1991 Repl. Vol. 5B) provides in part:

> (1) The general assembly recognizes that the board of medical examiners, while assuming and retaining ultimate authority for licensure and discipline in accordance with article 36 of this title and in accordance with this article, cannot practically and economically assume responsibility over every single allegation or instance of purported deviation from the standards of quality for the practice of medicine, from the standards of professional conduct, or from the standards of appropriate care and that an attempt to exercise such oversight would result in extraordinary delays in the determination of the legitimacy of such allegations and would result in the inappropriate and unequal exercise of its authority to license and discipline physicians. It is therefore the intent of the general assembly that the board of medical examiners utilize and allow professional review committees and governing boards to assist it in meeting its responsibilities under article 36 of this title and under this article.
>
> . . . .
>
> (3)(a) The use of professional review committees is declared to be an extension of the authority of the board of medical examiners. . . .

The entire text of the Colorado Professional Peer Review Act, Colo. Rev. Stat. § 12-36.5-101 to 203 (1991 Repl. Vol. 5B), is attached (Appendix 11-33).

STATEMENT OF FACTS

Petitioner, Dalrie A. Berg, D.O., is a physician licensed to practice medicine by the Colorado Board of Medical Examiners (the "Medical Board"). He has specialized in family practice for 40 years and is certified by both the American Medical Association and the American Osteopathic Association. He was a member of the staff and enjoyed extensive privileges at Respondent Humana Hospital Mountain View, Inc. ("Humana"), until June 1992, when Humana summarily suspended his obstetric privileges. The following facts are based on the pleadings and the decision of the Court of Appeals (Appendix 1-8).

The suspension arose out of allegations made by Respondents that were contemporaneous with a report Dr. Berg submitted to Humana. Following the birth of a baby at Humana, Dr. Berg advised Humana that an attending nurse (a) failed to prepare the patient properly at the time of delivery, (b) failed to prepare the delivery room properly, (c) ignored Dr. Berg's requests (d) physically obstructed Dr. Berg's access to the patient, and (e) interfered with the delivery by using contaminated gloves. Respondent Jack Shapiro, the executive director of Humana, never considered Berg's concerns about the nurse. Instead, he summarily suspended Dr. Berg's obstetric privileges at Humana.

Respondent Shapiro appointed an ad hoc investigative committee, which he instructed to consider the Respondents' allegations about the delivery along with other contrived allegations. After an investigation lasting a few hours, the ad hoc committee concluded the summary suspension should be vacated.

The proceedings did not end, however. Acting through its executive committee, Humana confronted Dr. Berg with the option of resigning his obstetric privileges or agreeing to enroll in the Colorado Personalized Education Program for Physicians.[1] If Dr. Berg accepted either option, Humana offered to characterize the proceedings as a collegial endeavor, and not professional review, and to refrain from reporting the proceedings to the Medical Board.

Refusing to accede to Humana's expedient, the so-called collegial endeavor, Dr. Berg initiated an action in the District Court, County of Adams, State of Colorado, to restore his obstetric privileges at Humana and to recover damages for the wrongful suspension of those privileges. In his complaint, he alleged among other claims, a civil rights claim under 42 U.S.C. § 1983, that as a result of Respondents' professional review action, which he asserted was fairly attributable to the state, his obstetric privileges were suspended, in violation of his Fourteenth Amendment rights.[2]

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[1] Dr. Berg alleged that the CPEPP condition was imposed without a hearing by Respondent Shapiro to carry out his personal agenda to humiliate Dr. Berg.

[2] The Complaint alleged the following violations:

(a) Shapiro arbitrarily and capriciously orchestrated proceedings to suspend Berg summarily on June 12 in order to preempt the procedural safeguards available to Berg under Articles IX and X of the Humana Bylaws.

(b) Shapiro prepared and published to members of the Ad Hoc Committee and the Executive Committee the Summary of the Contrived Allegations so as (i) to foreclose fair and effective consideration of the Suspension by the Ad Hoc Committee and

Respondents filed a motion to dismiss Dr. Berg's § 1983 claim for failure to state a claim for which relief can be granted, which the trial court granted. That dismissal is the subject of this petition.

After dismissing the § 1983 claim, however, the trial court conducted an evidentiary hearing to determine whether Respondents were entitled to immunity from Dr. Berg's other claims under the Health Care Quality Improvement Act, 42 U.S.C. § 11101, *et seq.* (1994) (the "HCQIA") and Colo. Rev. Stat. § 12-36.5-105. Dr. Berg

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the Executive Committee and (ii) to coerce Berg to surrender his Obstetric Privileges at Humana without offering him a hearing as required by the Humana Bylaws and Colorado law.

(c) Shapiro failed to give Berg the Preliminary Notice of Right to a Hearing.

(d) Shapiro failed to give Berg the Article 10.2 Notice of Hearing.

(e) Defendants utilized inherently biased procedures to review Berg's Obstetric Privileges.

(f) Shapiro threatened Berg in August 1992 with further restrictions if Berg did not withdraw his request for a hearing by the Executive Committee.

(g) The so-called "collegial endeavor" requiring Berg to satisfy the Conditions imposed by defendants was an illegitimate undertaking by defendants to circumvent the procedural safeguards provided under the Humana Bylaws and Colorado law.

(h) The offer by defendants to vacate the CPEPP Condition upon the receipt of Berg's resignation of his Obstetric Privileges was an illegitimate undertaking by defendants to coerce Berg to relinquish his Obstetric Privileges in violation of the Humana Bylaws and Colorado law.

(i) Defendants procured Berg's resignation by threatening unwarranted proceedings against Berg.

introduced evidence in the immunity hearing that Humana had hired a group of licensed psychologists who prepared for Humana a management report referred to throughout the proceedings as the Somerville Report. Dr. Berg also attempted to question a psychologist about that report. When the trial court sustained Humana's objection that the report was privileged, Dr. Berg made an offer that the findings in the Somerville Report supported the following conclusions:

> 1. Issues at Humana were rarely if ever addressed on the basis of objective merit. Rather, the consideration of issues within the hospital was heavily overlaid with suspicions of individual or group motive and possible hidden agendas.
>
> 2. Given the adversarial environment, the decision making process within the organization was flawed.

The trial court concluded Respondents were entitled to immunity under federal and state law and entered judgment against Dr. Berg. Dr. Berg appealed to the Colorado Court of Appeals. That court affirmed the dismissal of the § 1983 claim, stating that "because [Humana] was a private hospital, . . . the trial court was correct in dismissing [Dr. Berg's] § 1983 claim based on the actions of the peer review committee" (Appendix 3). However, the Colorado Court of Appeals reversed the trial court's order granting Respondents' assertions of immunity based on good faith and remanded the case for further proceedings (Appendix 8).

ARGUMENT FOR GRANTING WRIT OF CERTIORARI

I. THE ISSUE PRESENTED BY THIS CASE IS IMPORTANT IN EVERY STATE THAT HAS ENACTED LEGISLATION AUTHORIZING A STATE MEDICAL BOARD TO UTILIZE PROFESSIONAL REVIEW COMMITTEES TO EVALUATE MEDICAL PRACTICE IN PRIVATE HOSPITALS.

The Colorado Professional Review Act, Colo. Rev. Stat. § 12-36.5-101, *et seq.* ("CPRA"), stands at the forefront of a public-private partnership regulating the practice of medicine in Colorado. Like the legislation in several states, Colorado provides that the use of peer review committees is an extension of the authority of the Medical Board. Colo. Rev. Stat. § 12-36.5-103(3)(a) (use declared to be extension of authority of Medical Board); and *see,* Kans. Stat. Ann. § 65-4929(b) (considered to be state officers engaged in discretionary function); N.C. Gen. Stat. § 90-21.22 (f) (peer review deemed to be State directed and sanctioned).

Colorado has held that a license constitutes property that may not be revoked without due process of law:

> The right to practice a profession, once legally granted, is within the rights protected by the Constitutions of the United States and the State of Colorado, which provide that 'No person shall be deprived of life, liberty or property without due process of law.'

State Board of Registration for Professional Engineering v. Antonio, 409 P.2d 505, 508 (Colo. 1966).

Petitioner is requesting this Court to hold that when, as here, state legislation empowers private hospitals to discharge responsibilities of a state agency pursuant to a statutory scheme designed to accomplish the state's purposes of protecting the public health, the acts of those hospitals are state action for purposes of 42 U.S.C. § 1983.

A. The Colorado Professional Review Act not only provides a predicate for private professional review participants to enjoy the immunity benefits of The Health Care Quality Improvement Act and the state action doctrine of *Parker v. Brown*, but it also utilizes, authorizes, supervises and immunizes those participants as arms of the Colorado Board of Medical Examiners.

Professional review is a means of protecting the public from incompetent or negligent physicians. In Colorado that review is the administrative process by which the state decides which physicians shall be permitted to practice medicine in the state and its hospitals. Professional review decisions are made on behalf of the state by the Medical Board and, by virtue of CPRA, hospital staff and other physicians delegated such responsibility under CPRA.

When Constitutional deprivations can be exercised through procedures invested by the state in private individuals, the federal courts have treated those actions as state action for purposes of § 1983. *See, e.g., Del's Big Save Foods, Inc. v. Carpenter Cook, Inc.*, 795 F.2d 1344, 1346 (7th Cir. 1986) (if effect of state law arms creditor with state's power, debtor can challenge law in a suit under § 1983); *Goichman v. Rheuban Motors, Inc.*, 682 F.2d 1320, 1322 (9th

Cir. 1982) (private towing company acting pursuant to statutory scheme designed solely to accomplish its traffic laws acts under color of state law for purposes of § 1983); and *Niswonger v. American Aviation, Inc.*, 424 F. Supp. 1080, 1080-1082 (E.D. Tenn. 1976) (private airport engaged in public purpose a state actor).

The decision in *Patrick v. Burget*, 486 U.S. 94 (1988), was a watershed for professional review by hospitals. This Court rejected a hospital peer review committee's claim that it was immune from antitrust liability under the state-action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). Recognizing that "no State actor in Oregon actively supervises hospital peer review decisions," this Court held "the state-action doctrine does not protect the peer-review activities . . . from application of the federal antitrust laws." *Patrick*, 486 U.S. at 105.

Following the events underlying *Patrick*, but prior to the decision by this Court, Congress entered the professional review arena by enacting the HCQIA. That act establishes certain conditions of immunity from damages (42 U.S.C. § 11112(a)), sets notice and hearing requirements (42 U.S.C. § 11112(b)), and contemplates coordination with state legislatures which may elect to opt in or elect that the federal legislation not apply (42 U.S.C. § 11111(c)(2)). The HCQIA, however, excludes § 1983 claims from its limited grant of immunity. 42 U.S.C. § 11111.

Responding to the holding in the *Patrick* case and the objectives of the HCQIA, CPRA established a statutory

scheme, the elements of which are utilization of professional review committees, authorization of those committees to evaluate allegations of incompetence, supervision of peer review proceedings, and immunity from suit. CPRA encourages the Medical Board to utilize professional review committees and hospital governing boards to assist the Medical Board in meeting its responsibilities under the Colorado Medical Practice Act (Colo. Rev. Stat. § 12-36-101, *et seq.*) and CPRA. That utilization is declared to be an extension of the authority of the Medical Board. Colo. Rev. Stat. § 12-36.5-103(3)(a).

Professional review committees are authorized to evaluate allegations of incompetent behavior. They may investigate the quality or appropriateness of patient care rendered by, or the professional conduct of, any physician licensed under Colorado law who is subject to the authority of the hospital. Colo. Rev. Stat. § 12-36.5-104(4) and (6)(a)(II). Those investigations and review proceedings must conform with written bylaws, policies, or procedures that must provide for the notice, hearing and review protections described in Colo. Rev. Stat. § 12-36.5-104(7) through (11). Colo. Rev. Stat. § 12-36.5-104(6)(b). The Colorado courts have concluded that when evaluating a physician's professional behavior, peer review committees are arms of the state. *Nicholas v. North Colorado Medical Center, Inc.*, 902 P.2d 462, 466 (Colo. Ct. App. 1995), *aff'd, North Colorado Medical Center v. The Committee on Anticompetitive Conduct*, 914 P.2d 902 (Colo. 1996).

The Medical Board supervises the disciplinary activities of professional review committees, causing investigations to be made when it is informed of a professional

review proceeding against a physician. Colo. Rev. Stat. § 12-36-118(4)(b)(II). The determinations by a hospital peer review committee are presumed valid as actions of an administrative agency, based on Colorado's conclusion that "when performing peer review activities, the governing board of [a hospital] is clothed with the status of a state agency." *Nicholas*, 902 P.2d at 466, *aff'd, North Colorado Medical Center*, 914 P.2d 902.

Colorado augmented the benefits of the HCQIA (Colo. Rev. Stat. § 12-36.5-201 through 203). If professional review committees satisfy CPRA's procedures and do not act in bad faith, they are immune from suit. Colo. Rev. Stat. § 12-36.5-105.

B. This Court's holding in *Burton v. Wilmington Parking Authority* should be enforced when a state utilizes private hospitals and their staffs to assist the board of medical examiners in discharging its responsibilities of protecting the public health.

The Colorado Court of Appeals' decision is contrary to this Court's holding in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 721-725 (1961). Private conduct may become so impregnated with governmental policies, that it is subject to the Constitutional limitations placed on state action. The Colorado Court of Appeals disregarded the elements of CPRA – utilization, authority, supervision and immunity – and the relationship it forges between the Medical Board and professional review committees. It based its decision instead on a predicate that Humana is a private hospital. As observed in *West v. Atkins*, 487 U.S. 42, 52 (1988), Respondents are not

removed from the reach of § 1983 because they are professionals acting in accordance with professional discretion and judgment.

> If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity or that the particular action which he took was not authorized by state law.

Griffin v. State of Maryland, 378 U.S. 130, 135 (1964); *accord*, *Evans v. Newton*, 382 U.S. 296, 299 (1966) (conduct that is formerly "private" may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed on state action).

II. BECAUSE THE COLORADO COURT OF APPEALS APPLIED THE WRONG STANDARD TO DETERMINE STATE ACTION, ITS HOLDING SHOULD NOT BE ALLOWED TO STAND.

This case was decided wrongly by the Colorado Court of Appeals, not only because it relied on the "traditional-function" test of *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), but also because it used the wrong standard to determine "state action." The Colorado Court of Appeals failed to recognize that Colorado hospitals and their staffs are acting pursuant to a statutory scheme designed to protect the public health.

The Colorado courts improperly relied on *Rendell-Baker*, which used the "nexus" test of *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). Instead of determining, first, whether the Respondents were governmental or private and, if private, then applying the nexus test to determine if they were engaged in state action, the Colorado courts applied the nexus test to conclude Respondents were not involved in a function traditionally the prerogative of the state.

Rather than the *Rendell-Baker* test, the Colorado Court of Appeals should have applied the *Burton* test because the overall statutory scheme established by Colorado utilizes a private enterprise to act for a state agency. *Burton*, 365 U.S. 721-725. The relationship between the Medical Board and Colorado hospitals is dominated by the state's responsibility to protect the public health, safety and welfare by regulating competition and professional conduct. Colo. Rev. Stat. § 12-36.5-103(1). The state has authorized the Medical Board to discharge its regulatory function utilizing private hospitals and their staffs. The actions of those hospitals and their staffs, therefore, are state action for purposes of 42 U.S.C. § 1983.

CONCLUSION

The potential for a private hospital to deprive a licensed physician of a right to practice his profession is not an isolated injustice. Encouraged by the HCQIA, the burgeoning utilization of professional review committees, and the predictable and observable trend of legislatures cloaking peer review personnel with state-regulated disciplinary functions, creates a grave risk that a physician's rights can be violated without recourse. The Colorado Court of Appeals' opinion, if allowed to stand, permits a state legislature to determine when federal law applies. It is contrary to the intent of Congress under 42 U.S.C. § 1983 and confuses the law. Petitioner prays the Court to grant this writ.

Respectfully submitted,

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Dalrie A. BERG, D.O., Plaintiff-Appellant,

v.

Jack SHAPIRO; Humana Hospital Mountain View, Inc.; John A. Hoffman; Thomas J. Blanchard, M.D.; and Does 3 through 10, Defendants-Appellees.

No. 95CA1899.

Colorado Court of Appeals,
Div. I.

April 17, 1997.

Rehearing Denied May 29, 1997.

Certiorari Denied Dec. 15, 1997.

Sims & Boster, C. Garold Sims, Denver, for Plaintiff-Appellant.

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METZGER, Judge.

Plaintiff, Dalrie A. Berg, D.O., appeals the judgment dismissing his 42 U.S.C. § 1983 claim and his common-law claims against defendants, Jack Shapiro, Humana Hospital Mountain View, Inc., (the Hospital), John A. Hoffman, and Thomas J. Blanchard, M.D. We affirm the portion of the judgment dismissing the § 1983 claim, reverse the remainder of the judgment, and remand the cause for further proceedings.

After a preliminary investigation of complaints alleging that plaintiff, an obstetrician with privileges to practice at the Hospital, had engaged in "dangerous practices" which "threatened imminent patient harm," plaintiff's obstetrical privileges were suspended pending further investigation. That inquiry resulted in a recommendation that plaintiff's privileges be restored with educational and supervisory conditions.

Although plaintiff agreed in writing to these conditions, he did not comply with them and, instead, requested and then withdrew his requests for several hearings. Thereafter, he submitted a written voluntary resignation of his privileges to practice at the Hospital.

Later, he brought this action against the Hospital and various of its department head physicians, asserting common law claims and a civil rights claim under 42 U.S.C. § 1983, and seeking consequential damages and mandatory injunctive relief to restore his obstetrical privileges at the Hospital.

Defendants filed a C.R.C.P. 12(b)(5) motion, arguing that, because the professional peer review action did not constitute state action, plaintiff had failed to state a claim for relief under 42 U.S.C. § 1983. The trial court granted this motion.

Defendants also asserted that, because their actions were taken in good faith and afforded plaintiff due process, they were immune from liability under 42 U.S.C. § 11101 (1986) and § 12-36.5-105, C.R.S. (1991 Repl.Vol. 5B). After a several-day hearing on the immunity issue, the trial court found that all defendants were entitled to

immunity from suit and, accordingly, dismissed the action.

I.

Asserting that the Hospital's peer review action concerning his conduct constituted action taken under color of state law, plaintiff contends the trial court erred in dismissing his 42 U.S.C. § 1983 claim. We disagree.

The question of the existence of state action under § 1983 is whether the function performed has been "traditionally the *exclusive* prerogative of the State." *Rendell-Baker v. Kohn*, 457 U.S. 830, 842, 102 S.Ct. 2764, 2772, 73 L.Ed.2d 418, 428 (1982) (emphasis in original).

Professional peer review at private hospitals has not been viewed as the prerogative of the state. *See, e.g., Loh-Seng Yo v. Cibola General Hospital*, 706 F.2d 306 (10th Cir.1983) (listing cases from circuits). *See also Even v. Longmont United Hospital Ass'n*, 629 P.2d 1100 (Colo.App.1981). Instead, as the court noted in *Sosa v. Board of Managers of Val Verde Memorial Hospital*, 437 F.2d 173, 177 (5th Cir.1971), the purpose of peer review by a private hospital committee is "so that it can have confidence in the competence and moral commitment of its staff." Private hospitals had a right at common law to revoke the staff privileges of physicians for good cause. *Wong v. Stripling*, 881 F.2d 200 (5th Cir.1989).

Accordingly, because the Hospital was a private hospital, we conclude that the trial court was correct in dismissing plaintiff's § 1983 claim based on the actions of the peer review committee.

We are not persuaded that the decision in *Nicholas v. North Colorado Medical Center, Inc.*, 902 P.2d 462 (Colo.App.1995), *aff'd*, 914 P.2d 902 (Colo.1996) compels a different result. The plaintiff physician in that case asserted that the actions of the defendant hospital's peer review committee constituted anticompetitive conduct. Pointing to the elaborate hearing and appeal mechanisms in § 12-36.5-106, C.R.S. (1991 Repl.Vol. 5B), including direct review of decisions of the committee on anticompetitive conduct by the court of appeals, *see* § 12-36.5-106(10)(a), C.R.S. (1991 Repl.Vol. 5B), plaintiff argued that the hospital peer review committee did not have standing to challenge and seek review of the adverse determination of the Colorado State Board of Medical Examiners Committee on Anticompetitive Conduct. He argued that the hospital committee, acting in its peer review capacity, is a subordinate agency of the Colorado State Board of Medical Examiners Committee on Anticompetitive Conduct.

The division stated that the governing board of the hospital is "clothed with the status of a state agency," *Nicholas v. North Colorado Medical Center, Inc., supra*, at 466, when performing peer review activities. However, it went on to decide the standing issue on another ground.

Peer review concerning issues other than anticompetitive conduct was not at issue in that case, nor was the question whether peer review on other than noncompetitive conduct should be deemed action taken under color of state law for 42 U.S.C. § 1983 actions.

Here, in contrast, the decision of the peer review committee is not directly appealable to either the Colorado State Board of Medical Examiners or the court of appeals. The affected physician has the right to appeal the findings and recommendations of the committee to the governing board of the institution, organization, or society. Section 12-36.5-104, C.R.S. (1991 Repl.Vol. 5B).

Thus, we do not view the *Nicholas* decision to say that private hospital peer committee review action is taken under color of state law so as to trigger the provisions of 42 U.S.C. § 1983.

II.

Plaintiff next contends that the trial court erred in granting the Hospital's motion for protective orders precluding discovery of the data underlying a consultant firm's report on the basis that the psychologist-patient privilege applied. We agree.

In 1992, before the peer review at issue here occurred, the Hospital's administration hired a consulting firm of psychologists, Somerville & Company, Inc., to study, analyze, and make recommendations regarding the general relationship between the medical staff and the administration. After individual meetings with several of the hospital's medical and non-medical personnel, the consulting firm issued the "Somerville Report."

In this lawsuit, plaintiff requested the report and, in depositions, also sought to learn the details underlying the report. The Hospital refused to provide the information, asserting the psychologist-patient privilege. Plaintiff

then filed a motion to compel and the Hospital filed a motion for protective orders. Several months before the hearing, the trial court found that, while the information plaintiff sought was discoverable under C.R.C.P. 26, it was unconditionally privileged under § 13-90-107(1)(g), C.R.S. (1996 Cum.Supp.). Thus, the trial court entered a protective order and denied plaintiff's motion to compel.

Section 13-90-107(1)(g) provides: "[A] licensed psychologist . . . shall not be examined . . . as to any communication made by the client to such licensee or such licensee's advice given thereon in the course of professional employment. . . . "A psychologist is defined as a person who practices psychotherapy. Section 12-43-201, C.R.S. (1991 Repl.Vol. 5B). Only communications involving psychotherapy are privileged. *See B.B. v. People*, 785 P.2d 132 (Colo.1990).

The purpose of the psychologist-client privilege is identical to that of the physician-patient privilege, namely, to "enhance the effective diagnosis and treatment of illness by protecting the patient from the embarrassment and humiliation that might be caused by the [psychologist's] disclosure of information imparted to him by the patient during the course of a consultation for purposes of [psychological] treatment." *People v. District Court*, 719 P.2d 722, 724 (Colo.1986). *See also Clark v. District Court*, 668 P.2d 3 (Colo.1983); *B.B. v. People, supra.*

Reviewing the totality of the circumstances, we conclude that psychotherapy was not practiced by the psychologist and, therefore, that the psychologist-client privilege does not apply in this case.

First, the psychologist who authored the report and conducted the interviews did not view his work to constitute the practice of psychotherapy. He testified that: "The last time I practiced psychotherapy would probably have been in 1975." He further testified that he did not provide psychotherapy services to his many corporate clients and stated specifically that he did not practice psychotherapy in his consultations with the Hospital concerning its management conflicts.

When asked whether, in connection with his work with organizations, he would characterize his practice as involving any "medical type" procedures, the witness responded in the negative. He described the nature of his services to the Hospital as "to investigate and provide counsel around a perception on the part of the board of trustees that there were inadequate and ineffective communications between and among the administration and medical staff."

Second, in our view, a corporation cannot be a client of a psychologist as it may be with other professionals such as attorneys and accountants. Although a corporation is treated as a "person" in the eyes of the law, this legal fiction does not correspond to the medical reality that a corporation, singularly, cannot have medical or psychological needs. Here, the corporation itself was asserting the psychologist-client privilege.

Further, we are not aware of any case law applying the psychologist-client privilege to a corporation or other business entity.

Because of the trial court's ruling, plaintiff did not have access to this discoverable information at the time of

the summary judgment hearing. Therefore, the order granting defendants' assertions of immunity based on good faith and dismissing the action must be reversed.

That portion of the judgment dismissing plaintiff's 42 U.S.C. § 1983 claim is affirmed. The remainder of the judgment is reversed and the cause is remanded for further proceedings consistent with the views expressed in this opinion.

STERNBERG, C.J., and HUME, J., concur.

DISTRICT COURT, COUNTY OF ADAMS,
STATE OF COLORADO
Case Number 93CV 63, Division A

ORDER RE: DEFENDANTS' RULE 12(b)(5)
MOTION TO DISMISS PLAINTIFF'S THIRD, FOURTH,
SEVENTH AND EIGHTH CLAIMS FOR RELIEF
IN THE AMENDED COMPLAINT

DALRIE A. BERG, D.O.,
Plaintiff,

v.

JACK SHAPIRO, HUMANA HOSPITAL MOUNTAIN
VIEW, INC., and DOES NOS. 1 through 10,
Defendants.

Defendants' Rule 12(b)(5) motion seeks dismissal of Plaintiff's Third, Fourth, Seventh and Eighth claims for Relief in the amended complaint. Plaintiff has withdrawn the Eighth Claim.

Defendants argue that the Third Claim for Relief should be dismissed because Plaintiff has failed to sufficiently plead state action required for this civil rights claim. Opposing dismissal, Plaintiff argues that the requisite state action has been shown in that the hospital was performing a public function delegated to it pursuant to the Colorado Professional Review Act. This Court agrees with Defendants.

A private hospital may be deemed a state actor for purposes of 42 U.S.C. Sec. 1983 under the public function theory only when it performs a function which is "traditionally the exclusive prerogative of the state." *Rendell-*

Baker v. Kohn, 457 U.S. 830 (1982). Professional peer review at private hospitals does not meet this test. *See, Wong v. Stripling*, 881 F.2d 200 (5th Cir. 1989).

With respect to Plaintiff's Fourth and Seventh Claims for Relief, this Court agrees with Plaintiff that these claims are sufficiently pled. *See, Corporon v. Safeway Stores, Inc.*, 708 P.2d 1385 (Colo. App. 1985).

Accordingly, Plaintiff's Third Claim for Relief is dismissed, Plaintiff's Eighth Claim is deemed withdrawn and Defendants' Motion to Dismiss the Fourth and Seventh Claims is Denied.

DONE and SIGNED this 24th day of November, 1993.

BY THE COURT:

/s/ John J. Vigil
John J. Vigil
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing ORDER was mailed, postage prepaid, to the following:

DAVIS, GRAHAM
& STUBBS
L. Richard Freese
John Francis
370 17th Street #4700
Denver, CO 80202

C. Garold Sims
Sims & Boster
1775 Sherman Street #2015
Denver, CO 80203

Dated: 11-24-93

/s/ Julie Goodman

ARTICLE 36.5

Professional Review of Health Care Providers

PART 1

PROFESSIONAL REVIEW PROCEEDINGS – PHYSICIANS

12-36.5-101. Legislative declaration.
12-36.5-102. Definitions.
12-36.5-103. Use of professional review committees.
12-36.5-104. Establishment of professional review committees – function.
12-36.5-105. Immunity from liability.
12-36.5-106. Committee on anticompetitive conduct.

PART 2

CONFORMANCE WITH FEDERAL LAW AND REGULATION

12-36.5-201. Legislative declaration.
12-36.5-202. Rules and regulations – compliance with reporting requirements of federal act.
12-36.5-203. Limitations on liability relating to professional review actions.

PART 1

PROFESSIONAL REVIEW PROCEEDINGS-PHYSICIANS

12-36.5-101. Legislative declaration. (1) The general assembly hereby finds, determines, and declares that the Colorado state board of medical examiners created pursuant to article 36 of this title acts for the state in its sovereign capacity to govern licensure, discipline, and professional review of persons licensed to practice medicine in this state. The general assembly further finds,

determines, and declares that the authority to practice medicine in this state is a privilege granted by the legislative authority of the state and that it is necessary for the health, safety, and welfare of the people of this state that the board of medical examiners exercise its authority to protect the people of this state from the unauthorized practice of medicine and from unprofessional conduct by persons licensed to practice medicine under article 36 of this title.

(2) The general assembly recognizes that: Many patients of persons licensed to practice medicine in this state have restricted choices of physicians under a variety of circumstances and conditions; many patients lack the knowledge, experience, or education to properly evaluate the quality of medical practice or the professional conduct of those licensed to practice medicine; and it is necessary and proper that the board of medical examiners exercise its regulatory authority to protect the health, safety, and welfare of the people of this state.

(3) The general assembly recognizes that, in the proper exercise of its authority and responsibilities under this article, the board of medical examiners must, to some extent, replace competition with regulation and that such replacement of competition by regulation particularly with regard to physicians, is related to a legitimate state interest in the protection of the health, safety, and welfare of the people of this state.

12-36.5-102. Definitions. As used in this article, unless the context otherwise requires:

(1) "Board of medical examiners" means the Colorado state board of medical examiners created pursuant to section 12-36-103.

(2) "Governing board" means any board, board of trustees, governing board, or other body, or duly authorized subcommittee thereof, of any organization of health care providers, which board or body has final authority pursuant to such organization's written board or body has final authority pursuant to such organization's written bylaws, policies, or procedures to take final action regarding the recommendations of any authorized professional review committee.

(3) "Professional review committee" means any committee authorized under the provisions of this article to review and evaluate the professional conduct of and the quality and appropriateness of patient care provided by any physician licensed under article 36 of this title.

(4) "Records" means any and all written or verbal communications by any person, any member of an investigative body, or any professional review committee or governing board, or the staff thereof, arising from any activities of a professional review committee authorized by this article, including the complaint, response, correspondence related thereto, recordings or transcripts of proceedings, minutes, formal recommendations, decisions, exhibits, and other similar items or documents typically constituting the records of administrative proceedings.

12-36.5-103. Use of professional review committees. (1) The general assembly recognizes that the board

of medical examiners, while assuming and retaining ultimate authority for licensure and discipline in accordance with article 36 of this title and in accordance with this article, cannot practically and economically assume responsibility over every single allegation or instance of purported deviation from the standards of quality for the practice of medicine, from the standards of professional conduct, or from the standards of appropriate care and that an attempt to exercise such oversight would result in extraordinary delays in the determination of the legitimacy of such allegations and would result in the inappropriate and unequal exercise of its authority to license and discipline physicians. It is therefore the intent of the general assembly that the board of medical examiners utilize and allow professional review committees and governing boards to assist it in meeting its responsibilities under article 36 of this title and under this article.

(2) All physicians are encouraged to serve upon such professional review committees when called to do so and to study and review in good faith the professional conduct of physicians, including the quality and appropriateness of patient care.

(3)(a) The use of professional review committees is declared to be an extension of the authority of the board of medical examiners. However, except as otherwise provided in this article, nothing in this article shall limit the authority of professional review committees properly constituted under this article.

(b) Professional review committees, the members who constitute such committees, governing boards, and

persons who participate directly or indirectly in professional review proceedings are granted certain immunities from liability arising from actions which are within the scope of their activities and taken in good faith as provided in section 12-36.5-105. Such grants of immunity from liability are declared to be necessary to ensure that professional review committees and governing boards can exercise their professional knowledge and judgment.

12-36.5-104. Establishment of professional review committees – function. (1) A professional review committee may be established pursuant to this section to review and evaluate the quality and appropriateness of patient care provided by and the professional conduct of any physician licensed under article 36 of this title.

(2) Persons licensed to practice medicine under article 36 of this title who are actively engaged in the practice of medicine in this state shall constitute a majority of any professional review committee established pursuant to this section, except for those boards authorized by paragraph (g) of subsection (4) of this section.

(3) A utilization and quality control peer review organization, as defined pursuant to 42 U.S.C. sec. 1320c-1, or any other organization performing similar review services under federal or state law shall be an approved professional review committee under this article.

(4) Any professional review committee established by any of the following organizations, entities, or professional societies shall be an approved professional review committee under this article if it operates pursuant to

written bylaws, policies, or procedures which are in compliance with this article and which have been approved by its governing board:

(a) The medical staff of a hospital licensed pursuant to part 1 of article 3 of title 25, C.R.S., or certified pursuant to section 25-1-107 (1)(*l*)(II), C.R.S.;

(b) The medical staff of a hospital-related corporation. For the purposes of this paragraph (b), a corporation is "hospital-related" if the licensed or certified hospital or holding company of such hospital has ownership or control of such corporation.

(c) A society or association of physicians whose membership includes not less than one-third of the doctors of medicine or doctors of osteopathy licensed to practice and residing in this state, if the physician whose services are the subject of the review is a member of such society or association;

(d) A society or association of physicians licensed to practice and residing in this state and specializing in a specific discipline of medicine, whose society or association has been designated by the board of medical examiners as the specialty society or association representative of physicians practicing such specific discipline of medicine, if the physicians whose services are the subject of the review is a member of such specialty society or association;

(4) (e) An individual practice association or a preferred provider organization comprised of at least twenty-five physicians or a medical group which predominantly serves members of a health maintenance organization

licensed pursuant to parts 1 and 4 of article 16 of title 10, C.R.S. A professional review committee established pursuant to this paragraph (e) shall have jurisdiction to review only physicians who are members of the association or organization creating and authorizing that committee; except that such professional review committee may review the care provided to a particular patient referred by a member of such association or organization to another physician who is not a member of such association or organization.

(f) A Colorado corporation authorized to insure physicians pursuant to article 3 of title 10, C.R.S., or any other corporation authorized to insure such physicians in this state when designated by the board of medical examiners under subsection (5) of this section;

(g) Governing boards of any entity which has a professional review committee established pursuant to article 36 of this title;

(h) Any peer review committee established or created by a combination or pooling of any of the organizations authorized by this section to have a professional review committee;

(i)(I) A nonprofit corporation or association comprised of representatives from a statewide medical society and a statewide hospital association. Such association shall be comprised of physicians, hospital administrators, and hospital trustees, with a majority of such representatives being physicians. The association may establish, or contract for, one or more peer review committees to review the care by hospital staff physicians, with priority given to small rural medical staffs. Such peer review

services shall be available statewide on a fee-for-service basis to licensed or certified hospitals at the joint request of the governing body and the medical staff of the hospital or at the sole request of the governing body of the hospital. If a physician being reviewed specializes in a generally recognized speciality of medicine, at least one of the physicians on the peer review committee shall be a physician practicing such speciality.

(II) For purposes of the introductory portion to this subsection (4), the bylaws, policies, and procedures shall be in compliance with this article and be approved by the nonprofit corporation or association.

(5) The board of medical examiners may establish by rule or regulation procedures necessary to authorize other health care or physician organizations or professional societies to establish professional review committees.

(6)(a) A professional review committee acting pursuant to this part 1 may investigate or cause to be investigated:

(I) The qualifications of any physician licensed under article 36 of this title who seeks to subject himself to the authority of any organization, entity, or professional society listed in subsection (4) of this section or any organization or professional society which has been authorized by the board of medical examiners to establish a professional review committee pursuant to subsection (5) of this section; or

(II) The quality or appropriateness of patient care rendered by or the professional conduct of any physician

licensed under article 36 of this title who is subject to the authority of such organization, entity, or professional society.

(b) Such investigation shall be conducted in conformity with written bylaws, policies, or procedures adopted by such organization, entity, or professional society.

(7) The written bylaws, policies, or procedures of any professional review committee shall provide for at least the following:

(a) If the findings of any investigation indicate that the physician who is the subject of the investigation is lacking in qualifications, has provided substandard or inappropriate patient care, or has exhibited inappropriate professional conduct, the professional review committee shall hold a hearing, unless the physician waives his right to a hearing, to consider the findings; except that, if the professional review committee is submitting its findings to another professional review committee for review, only one hearing shall be necessary prior to any appeal before the governing body.

(b) Any person who has participated in the course of any investigation shall be disqualified as a member of the committee at any hearing held pursuant to paragraph (a) of this subsection (7), but such person may participate as a witness in such hearing.

(c) The physician who is the subject of any investigation shall be given reasonable notice of such hearing and shall have a right to be present, to be represented by

legal counsel at such hearing, and to offer evidence in his own behalf.

(d) After such hearing, the professional review committee shall make any recommendations it deems necessary to the governing board unless provided by federal law or regulation.

(e) A copy of such recommendation shall be given to the subject physician who then shall have the right to appeal the findings and recommendations of the professional review committee to the governing board to which the recommendations are made.

(8)(a) All governing boards shall adopt written bylaws, policies, or procedures which provide that a physician who is the subject of an adverse recommendation by a professional review committee may appeal to the governing board. Such bylaws, policies, or procedures shall provide that the physician shall be given reasonable notice of his right to appeal and, unless waived by the physician, shall have the right to appear before the governing board, to be represented by legal counsel, and to offer such argument on the record as he deems appropriate.

(b) The bylaws may provide that a committee of not fewer than three members of the governing board may hear the appeal. Such bylaws may also allow for an appeal to be heard by an independent third party designated by the board.

(9) All governing boards which are required to report their final actions to the board of medical examiners are not otherwise relieved of such obligations by virtue of any provision of this article.

(10)(a) The records of a professional review committee, a governing board, or the committee on anticompetitive conduct shall not be subject to subpoena or discovery and shall not be admissible in any civil suit brought against a physician who is the subject of such records.

(b) Notwithstanding the provisions of paragraph (a) of this subsection (10), such records shall be subject to subpoena and available for use:

(I) By the committee on anticompetitive conduct;

(II) By either party in any appeal or de novo proceeding brought pursuant to this part I:

(III) By a physician in a suit seeking judicial review of any action by the governing board;

(IV) By a governing board seeking judicial review.

(11) At the request of the board of medical examiners, a governing board shall provide the board of medical examiners with the complete record of all professional review proceedings, including, but not limited to, the findings, recommendations, and actions taken.

(12) Investigations, examinations, hearings, meetings, or any other proceedings of a professional review committee or governing board conducted pursuant to the provisions of this part 1 shall be exempt from the provisions of any law requiring that proceedings be conducted

publicly or that the minutes or records be open to public inspection.

(13) All proceedings, recommendations, records, and reports involving professional review committees or governing boards shall be confidential.

(14) A professional review committee or governing board which is constituted and conducts its reviews and activities pursuant to the provisions of this part 1 is declared not to be an unlawful conspiracy in violation of section 6-4-104 or 6-4-105, C.R.S.

12-36.5-105. Immunity from liability. (1) A member of a professional review committee, a witness before a professional review committee, or any person who files a complaint or otherwise participates in the professional review process shall be immune from suit in any civil or criminal action, including antitrust actions, brought by a physician who is the subject of the review by such professional review committee, if such member made a reasonable effort to obtain the facts of the matter as to which he acted, acted in the reasonable belief that the action taken by him was warranted by the facts, and otherwise acted in good faith within the scope of such professional review committee process and if such witness or participant acted in good faith within the scope of such professional review committee process.

(2) The governing board, the individual members of such board, and the entity which has established a peer review committee pursuant to section 12-36.5-104 shall be immune from suit for any damages in a civil or criminal action, including antitrust actions, brought by a physician who is the subject of any action taken by such board or

members if such board or its members, acting as individuals, act in good faith. Good faith shall include reliance upon the recommendations of the review committee, but good faith shall not be presumed if the board or a member has knowledge concerning the review in question which would cause such reliance to be unwarranted. Good faith shall also require that the board otherwise acted in good faith, including the consideration of any facts not previously available to and considered by the peer review committee, and that the board acted in reasonable belief that the action taken was warranted by the facts.

12-36.5-106. Committee on anticompetitive conduct. (1) There shall be established a permanent, independent committee of the board of medical examiners to be known as the committee on anticompetitive conduct referred to in this section as "the committee".

(2) The committee shall be composed of five persons, none of whom shall be a member of the board of medical examiners. Four members of the committee shall be licensed to practice medicine and actively engaged in the practice of medicine in this state and shall be appointed by the board of medical examiners. No member shall practice in the same medical subspeciality as any other member nor conduct his primary practice in the same county as any other member. One member shall be appointed by the governor and shall be an attorney licensed to practice in this state who has particular expertise and experience in the area of antitrust law.

(3) Each member of the committee shall serve for a term of three years and may be reappointed for one

additional term. The initial committee shall be appointed as follows: Two members, including the attorney member, for terms of three years; two members for terms of two years; and one member for a term of one year. All subsequent appointments shall be for terms of three years.

(4) Any member of the committee may be removed by his appointing authority for neglect of duty, incapacity, or misconduct. Any vacancy shall be filled by the appointing authority for the remainder of the vacated term.

(5) The committee shall annually elect a chairman from among its members. Any three members of the committee shall constitute a quorum. Any action of a majority of those present comprising such quorum shall be the action of the committee. Committee members shall be compensated as provided in section 24-34-102(13), C.R.S. The committee may, in its discretion, utilize the expertise of consultants, including, but not limited to, legal, medical, and business specialists. The costs of such consultants shall be assessed and collected as provided in subsection (11) of this section.

(6) The committee shall adopt procedural rules, including emergency rules, pursuant to the rule-making provisions of the "State Administrative Procedure Act", article 4 of title 24, C.R.S., including rules related to the disqualification of a committee member, which rules shall be guided by section 24-4-105(1), C.R.S.

(7) Any physician who is the subject of a final action by a governing board, which action results in the denial, termination, or restriction of privileges at or membership in or participation in an organization, and who

believes that such action resulted from unreasonable anti-competitive conduct shall have, as his sole and exclusive remedy, direct review of the record by the committee. Such review shall be limited to the sole issue of whether such final board action resulted from unreasonable anti-competitive conduct. Failure to exhaust this administrative remedy before the committee shall preclude the right of de novo review on the merits of the issue of unreasonable anticompetitive conduct.

(8) Nothing in this article shall preclude a physician or health care provider otherwise aggrieved by the final action of a governing board from seeking other remedies available to them by law, except as provided in subsection (7) of this section.

(9) Review by the committee shall be in accordance with the following procedures and, to the extent practicable, in accordance with the procedures used in the district courts of this state:

(a) Review shall be initiated by filing a verified complaint with the committee, no later than thirty days after receipt of a notice of final action by the governing board, alleging, with specificity, all facts disclosed in the record and all additional facts known to the complainant which would support his allegation that the final action taken by the governing board resulted from unreasonable anticompetitive conduct.

(b) The committee shall mail a copy of such complaint to the governing board and the professional review committee by certified mail, return receipt requested, within five days of the receipt of such complaint by the committee, advising them of their right to file a verified

answer to the allegations stated therein. Receipt of such complaint by mail shall make the recipients thereof a party to these proceedings.

(c) The governing board and professional review committee shall have thirty days after receipt of the complaint to file their verified answer.

(d) Within thirty days of receipt of the complaint, unless the committee, for good cause shown, extends the time period not to exceed an additional thirty days, the committee shall determine whether the complaint alleges sufficient facts which, if true, would substantiate a finding of probable cause that the final action taken by the governing board resulted form unreasonable anticompetitive conduct.

(e) If the committee finds no such probable cause exists, it shall dismiss the complaint, which dismissal shall constitute final administrative action.

(f) If the committee finds such probable cause exists, it shall schedule a hearing. At such hearing the committee shall review the record below on the sole issue of whether the final action of the governing board resulted from unreasonable anticompetitive conduct and shall take evidence only with regard to the additional facts specifically alleged in the complaint or answer regarding unreasonable anticompetitive conduct, except when, in the discretion of the committee, the interests of a fair hearing demand otherwise.

(g) The attendance of witnesses and the production of books, patient records, papers, and other pertinent

documents at the hearing may be summoned by subpoenas issued by the chairman of the committee or his designee, which shall be served in the manner provided by the Colorado rules of civil procedure for service of subpoenas. Any subpoena issued pursuant to this paragraph (g) shall be enforceable in the district court.

(h) No evidentiary hearing shall last more than eight hours, unless the committee, in its discretion, determines that additional time is necessary in the interests of a fair hearing. Except as provided otherwise in this section, any evidentiary hearing shall be conducted in accordance with section 24-4-105(4) and (7), C.R.S.

(i) An evidentiary hearing shall be scheduled within a reasonable time after a finding that probable cause exists.

(j) Within a reasonable time after the completion of its hearing, the committee shall issue its written findings and final order.

(k) If the committee finds by a preponderance of evidence that the final action of the governing board resulted from unreasonable anticompetitive conduct, it shall issue its final order disapproving and setting aside such action or modifying the action taken by the governing board in whole or in part, which final order shall be binding on the parties. A copy of such order shall be mailed by certified mail, return receipt requested, to the parties.

(l) If the committee fails to find that the final action of the governing board resulted from unreasonable anticompetitive conduct as provided in paragraph (k) of this

subsection (9), it shall issue its order dismissing the complaint, and the final action of the governing board shall stand.

(m) If the committee finds that the record of the governing board is insufficient to permit the committee to reach appropriate findings with regard to unreasonable anticompetitive conduct, it may remand the case for further review by the governing board.

(n) In any case presented to the committee where the medical practice of the complainant constitutes a clear and present danger to patients, the committee shall refer the case to the board of medical examiners for such action as the board deems appropriate.

(10)(a) Following final administrative action by the committee, such action of the committee may be reviewed only by the court of appeals through appropriate proceedings brought pursuant to section 24-4-106(11), C.R.S.

(b) Following final administrative action by the committee, any party aggrieved by the final action of a governing board who wishes to challenge the action of such governing board, rather than the committee's review of such action, shall have the right to seek de novo review on the merits in a district court in Colorado. In no event shall the board of medical examiners or the committee be made parties to such a district court action.

(c) As a condition of filing a complaint under paragraph (a) of subsection (9) of this section, the complainant shall post a cash bond or equivalent liquid security of three thousand dollars to cover anticipated costs which may be assessed against him. Within thirty days of

receipt of service of a complainant on a governing board, or concurrently with the filing of an answer, whichever is earlier, the governing board shall post a cash bond or equivalent liquid security of three thousand dollars to cover anticipated costs which may be assessed against it as a party. The committee may enforce this latter requirement through the district court.

(11) The committee shall assess and collect all costs associated with its activities, including attorney fees incurred by the committee, the per diem and reasonable expenses of each committee member, and other reasonable expenses, from the losing party or as the committee deems appropriate.

(12) The committee shall promulgate such rules and regulations as may be necessary for the implementation of this section, including mechanisms to secure the payment of costs as provided in paragraph (c) of subsection (10) and subsection (11) of this section.

(13) Any member of the committee shall be immune from suit in any civil action based upon any proceedings or other official actions performed in good faith. Any witness, consultant, or staff member participating in good faith in the making of a report or any person participating in good faith in any investigative or administrative proceeding pursuant to this section shall also be immune from suit in any civil action.

PART 2

CONFORMANCE WITH FEDERAL LAW AND REGULATION

12.36.5-201. Legislative declaration. The general assembly hereby finds, determines, and declares that the enactment of this part 2 is necessary in order for the state to comply with the provisions of the federal "Health Care Quality Improvement Act of 1986", as amended. It is the intent of the general assembly that the provisions of this part 2 are to be interpreted as being complementary to the provisions of part 1 of this article. The provisions of this part 2 are intended to be responsive to specific requirements of the federal "Health Care Quality Improvement Act of 1986", as amended. If the provisions of this part 2 conflict with the provisions of part 1 of this article, other than with respect to the specific requirements of the federal "Health Care Quality Improvement Act of 1986", as amended, the provisions of part 1 of this article shall prevail.

12-36.5-202. Rules and regulations – compliance with reporting requirements of federal act. Upon implementation of the federal "Health Care Quality Improvement Act of 1986", as amended, 42 U.S.C. secs. 11101 through 11152, and upon implementation of the federal data bank, the board of medical examiners shall promulgate rules and regulations to comply with such act, which rules and regulations are consistent with the standards and the reporting requirements of such act.

12-36.5-203. Limitations on liability relating to professional review actions. (1) The following persons shall not be liable for damages in any civil action with

respect to their participation in, assistance to, or reporting of information to a professional review body in connection with a professional review action in this state, and such persons shall not be liable for damages in any civil action with respect to their participation in, assistance to, or reporting of information to a professional review body which meets the standards of and is in conformity with the provisions of the federal "Health Care Quality Improvement Act of 1986", as amended, 42 U.S.C. secs. 11101 through 11152, upon implementation of such act by the federal government:

(a) The professional review body;

(b) Any person acting as a member of or staff to the professional review body;

(c) Any person under a contract or other formal agreement with the professional review body;

(d) Any person who participates with or assists the professional review body with respect to the professional review action.

(2) Notwithstanding any other provision of law, no person, whether as a witness or otherwise, who provides information to a professional review body regarding the competence or professional conduct of a physician shall be held, by reason of having provided such information, liable in damages in any civil action unless such information is false and the person providing it knew that such information was false.

(3) For the purposes of this section, unless the context otherwise requires;

(a) "Professional review action" means an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity and which is based on the competence or professional conduct of an individual physician, which conduct affects or may affect adversely the clinical privileges of or membership in a professional society of the physician. "Professional review action" includes a formal decision by the professional review body not to take an action or make a recommendation as provided in this paragraph (a) and also includes professional review activities relating to a professional review action. An action shall not be considered to be based upon the competence or professional conduct of a physician if the action is primarily based on:

(I) The physician's association or lack of association with a professional society or association;

(II) The physician's fees or his advertising or engaging in other competitive acts intended to solicit or retain business;

(III) The physician's association with, supervision of, delegation of authority to, support for, training of, or participation in a private group practice with a member or members of a particular class of health care practitioners or professionals;

(IV) The physician's participation in prepaid group health plans, salaried employment, or any other manner of delivering health services whether on a fee-for-service basis or other basis;

(V) Any other matter that does not relate to the competence or professional conduct of a physician.

(b) "Professional review body" means a health care entity and the governing body or any committee of a health care entity which conducts professional review actions and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity.

Supreme Court, U.S.
FILED
APR 15 1998
CLERK

(2)

No. 97-1516

In The

Supreme Court of the United States

October Term, 1997

DALRIE A. BERG, D.O.,

Petitioner,

v.

JACK SHAPIRO, HUMANA HOSPITAL MOUNTAIN VIEW, INC., JOHN A. HOFFMAN, THOMAS J. BLANCHARD and DOES 3 through 10,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Colorado

BRIEF OF RESPONDENTS JACK SHAPIRO, HUMANA HOSPITAL MOUNTAIN VIEW, INC., JOHN A. HOFFMAN, THOMAS J. BLANCHARD AND DOES 3 THROUGH 10, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Respondents respectfully restate Petitioner's Question Presented for Review. The issue, succinctly stated, involves whether peer review activities of Respondent Humana Hospital Mountain View, Inc., a private hospital, and the other Respondents, who are members of its staff and peer review committee, constitute state action sufficient to permit Petitioner's claim based on 42 U.S.C. § 1983. Contrary to Petitioner's suggestion, the Supreme Court of the State of Colorado has never concluded that peer review committees are arms of the state, and has expressly declined to so hold.

PARTIES TO THE PROCEEDING

The parties to the proceeding below are the Petitioner, Dalrie A. Berg, D.O., and the Respondents Jack Shapiro, Humana Hospital Mountain View, Inc., John A. Hoffman, Thomas J. Blanchard, and Does 3 through 10, who are unknown parties who allegedly participated in the peer review activities affecting Petitioner.

RULE 29.6 LISTING

Humana Hospital Mountain View, Inc. is now owned by Columbia-HealthOne, LLC and is called "Columbia North Suburb Medical Center." The managing member of Columbia-HealthOne, LLC is Columbia/HCA of Denver, Inc., whose owner is Columbia/Rose Health System, Inc. Galen Health Care, Inc. is the owner of Columbia/Rose Health System, Inc. Western Plains Regional Hospital, Inc., owns Galen Health Care, Inc. Columbia/HCA Healthcare Corp. owns Western Plains Regional Hospital, Inc. Humana has no non-wholly owned subsidiaries

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STATEMENT OF THE CASE

Respondents reiterate that the question before this Court deals solely with an issue of law: whether peer review activities conducted by a private hospital of its hospital staff pursuant to its own bylaws, protocols and procedures constitute state action for purposes of 42 U.S.C. § 1983. In the proceedings below, Petitioners did not challenge the trial court's findings that Respondents acted with due process and fair procedure in resolving the complaints against him of inadequate professional conduct in his obstetrical practice of Humana. Nor did Petitioner challenge the trial court's conclusions of law that peer review immunity statutes should be applied and that Petitioner's claims should be dismissed because Respondents were immune from suit under those statutes. Petitioner brings forward only the issue of whether he could maintain an action against Respondents under § 1983 of the Federal Civil Rights Act.

Nevertheless, Dr. Berg's petition for certiorari is replete with allegations from his complaint against Respondents which have no basis in the record, or in the trial court's extensive findings of fact and conclusions of law entered at the conclusion of the evidentiary hearing held to address Respondents' defense of immunity under the Colorado and Federal statutes.

As found by the trial court, the facts upon which this case rest are as follows:

Late in the evening of June 10, 1992, or early in the morning of June 11, 1992, one of Dr. Berg's patients, referred to as H.P., was admitted to Humana ready to deliver her baby. On June 11, 1992, Nurse Mowers, one of

the attending nurses, submitted to Humana an "Occurrence Report" regarding the delivery of H.P.'s child. The Occurrence Report stated that Dr. Berg was in the delivery room at the time the child was being spontaneously delivered by the patient and that Nurse Mowers made repeated suggestions to Dr. Berg that he needed to attend to the patient, which he refused to do. Nurse Mowers was required to deliver the child herself. The Occurrence Report also stated that Dr. Berg administered Methergine by intravenous push and that Dr. Berg did suturing on a uterine tear without anesthesia. H.P. repeatedly complained of discomfort during the procedure, yet Dr. Berg refused to administer anesthesia which was offered by Nurse Mowers.

At the start of the business day on June 12, 1992, action commenced with respect to the Occurrence Report. The Occurrence Report was reviewed and considered by Dr. Branstetter, the head of the Department of Obstetrics, Dr. Blanchard, the deputy head of the Department of Family Practice, Mr. Hoffman, Humana's assistant administrative director, and Dr. Haffey, the chief of the medical staff. Both Dr. Branstetter and Dr. Blanchard stated to Dr. Haffey, in writing, that it was their opinion that summary suspension of the obstetric privileges of Dr. Berg was required. Following discussion among the medical staff, Dr. Haffey, in his capacity as the chief of the medical staff, imposed a summary suspension of Dr. Berg's obstetrical privileges at Humana pending further investigation. The trial court found that the "[a]ction was taken by [Dr.] Haffey under circumstances where failure to take such action might have resulted in imminent danger to the health of any individual." The trial court also concluded

that the summary suspension of Dr. Berg's obstetrical privileges was taken with the reasonable belief that the action was in furtherance of quality health care and after a reasonable effort to obtain the facts of the matter.

Immediately following the summary suspension, Dr. Berg received notice of his right to an informal hearing pursuant to Section 9.3.2 of Humana's bylaws. The notice identified several cases where Dr. Berg had encountered medical problems in addition to the case involving H.P. Dr. Haffey quickly appointed an *ad hoc* investigating committee composed of three medical staff physicians. The *ad hoc* investigating committee and Dr. Berg received advance notice of the matters which were to be considered and the *ad hoc* investigating committee discussed the matters with Dr. Berg "at length." The *ad hoc* committee also interviewed Nurse Mowers.

The *ad hoc* investigating committee prepared a written report to the Medical Staff Executive Committee recommending that the summary suspension should be removed, but that Dr. Berg be placed on probation with certain educational and related conditions. Prompted by the report, the Medical Staff Executive Committee decided to remove the summary suspension of Dr. Berg's obstetrical privileges on the conditions that Dr. Berg enter into a continuing educational program and agree to supervision of his obstetrical practice at Humana. Dr. Berg, who was present at the Executive Committee meeting, chose not to respond spontaneously to the Executive Committee's action, but, rather, indicated that he would contact his attorney. After seeking the advice of his attorney, Dr. Berg signed a written agreement dated July 1,

1992 which agreed to those two conditions of his continuing to practice obstetrics at Humana. The trial court found, as a matter of fact, that Dr. Berg's execution of the agreement negated any need for further actions or hearings by Humana under its bylaws.

After waiting for about five or six weeks, Dr. Berg advised Humana that he had decided not to comply with the agreement of July 1, 1992, and instead requested the matter to be reopened and that formal peer review proceedings under the bylaws be instituted. There was no obligation under the bylaws for the Medical Staff Executive Committee to reopen the matter, since as found by the trial court, Dr. Berg had entered into a binding agreement terminating the peer review process. Nevertheless, Dr. Berg withdrew that request before the Executive Committee could act on it. The trial court found that Dr. Berg was fully familiar with his rights under Humana's bylaws, particularly because he was chairman of a standing medical staff "By-Law Committee." The trial court, thus, concluded that Dr. Berg's withdrawal of his new request for hearing was fully voluntary and knowing, and was a firm reason for Humana not to proceed with Dr. Berg's peer review process further.

Dr. Berg changed his mind again, however, and at his request, he was permitted to address the Medical Staff Executive Committee on September 8, 1992. At the Executive Committee meeting, one of the physicians on the Committee reported that Dr. Berg had advised him prior to the meeting that he no longer wished to practice obstetrics at Humana; however, no written resignation had been received. Thus, after hearing from Dr. Berg and subsequent deliberation, the Executive Committee asked

for Dr. Berg either to resign his obstetrical privileges at Humana in conformity with his prior statement, or his obstetrical privileges would be suspended. After consultation with his attorneys, on September 9, 1992, Dr. Berg resigned his obstetrical privileges, which the trial court found was "a voluntary act on the part of Dr. Berg to the extent that his free will to make a choice was not overcome by the conduct of the hospital or any other of the defendants in this case." Again, the trial court found that due to Dr. Berg's voluntary resignation of his obstetrical privileges, further hearing or other proceedings under Humana's bylaws were neither expected nor required.

However, Dr. Berg went back and forth thereafter, changing his mind several times over the period of September and October of 1992. During this period, Humana offered to reinstate Dr. Berg's obstetrical privileges under the terms which Dr. Berg had negotiated and agreed to in the July 1, 1992 agreement. Finally, after negotiations between his counsel and Humana's attorneys, Dr. Berg resigned his privileges once and for all by a letter dated October 30, 1992. The trial court again found that Dr. Berg's actions caused Humana not to move forward with its formal hearing procedures under its bylaws.

In its conclusions of law, the trial court concluded that the elements of the immunity statute (42 U.S.C. § 11112) had been satisfied, specifically as follows:

> (1) The summary suspension of Dr. Berg's obstetrical privileges at Humana was taken under circumstances where failure to act may have resulted in imminent danger to the health of any individual;

> (2) The actions were taken in the reasonable belief that the actions were in furtherance of quality health care;
>
> (3) At each step of the proceeding, the action was taken after reasonable efforts were taken to obtain the facts. In connection with activities of the *ad hoc* committee, Dr. Berg was given "every opportunity to explain himself or discuss the matters";
>
> (4) Humana's actions were taken after procedures which afforded adequate notice and hearing to Dr. Berg and such procedures were fair to Dr. Berg; and
>
> (5) Humana's actions were made in the reasonable belief that they were warranted by the facts.

The trial court concluded that the elements of the Colorado immunity statute had also been satisfied:

> (1) The actions were taken after a reasonable effort to obtain the facts of the matter upon which action was to be taken;
>
> (2) The actions were taken with a reasonable belief that the actions taken were warranted by the facts; and
>
> (3) The actions were taken in good faith within the scope of the professional review committee process.

The substandard obstetrical practice of Dr. Berg did not escape notice of the Colorado State Board of Medical Examiners. On June 14, 1995, the Colorado Attorney General initiated a formal complaint against Dr. Berg. An amended complaint was filed by the Colorado Attorney

General on August 31, 1995. The amended complaint set forth eight specific cases, including patient H.P., in which Dr. Berg had failed to act properly. The Attorney General alleged that Dr. Berg committed an act or omission constituting gross negligent medical practice or two or more acts or omissions which failed to meet generally accepted standards of medical practice.

On the eve of a hearing on the formal charges before the State Board, Dr. Berg entered into a Stipulation and Final Agency Order with the Attorney General. Pursuant to that Stipulation, Dr. Berg agreed that, in the absence of his presenting adequate evidence to the contrary, there was sufficient evidence to establish a prima facie case of two or more acts or omissions by him which failed to meet generally accepted standards of medical practice. Dr. Berg also agreed that he would not thereafter engage in any form of obstetrical practice. Dr. Berg further agreed that his medical license to continue to practice as a general practitioner (but not as a specialist in obstetrics) was to be placed on probationary status for a period of five years. During the probationary period, Dr. Berg agreed to be monitored by a "practice monitor."

At the evidentiary hearing, the trial court declined to admit portions of a report prepared by Somerville & Associates, a team of consulting psychologists, concerning management matters at Humana. The Court of Appeals reversed the trial court's evidentiary finding, holding that the Somerville Report was not protected by Colorado's psychologist-client privilege statute and remanded the case for further proceedings consistent with its ruling on admissibility and privilege. Contrary to Petitioner's assertions, no part of the Court of Appeals

ruling deals with the issue of immunity or good faith, only that the Somerville Report is not protected by the psychotherapist-client privilege. No ruling was made as to the veracity or relevance of the report; admissibility of the report remains the purview of the trial court upon remand.

REASONS FOR DENYING THE WRIT

THE CONDUCT OF PEER REVIEW ACTIVITIES BY A PRIVATE HOSPITAL'S GOVERNING BODY OF ITS OWN MEDICAL STAFF DOES NOT CONSTITUTE STATE ACTION TO SUPPORT PETITIONER'S CLAIMS UNDER 42 U.S.C. § 1983.

A. Peer Review has not traditionally been the exclusive prerogative of the state

42 U.S.C. § 1983, enacted pursuant to the authority of Congress to enforce the Fourteenth Amendment, prohibits interference with federal rights under color of state law. The issue before this Court is whether Humana's action, as a private hospital, in temporarily suspending Dr. Berg's hospital privileges, is state action. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2745, 73 L.Ed.2d 482 (1982). Unless state action is involved, no constitutional rights are implicated and no claim under § 1983 exists. *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 205 (1982). If the action of Humana is not state action, the inquiry ends.

By strained statutory interpretation and facile but fallacious logic, petitioner attempts to bootstrap the conduct of professional review activities into state action and

a private hospital into a division of the Colorado Board of Medical Examiners. Petitioner's position is not supported by history, precedent or sound reasoning. Evaluation of the competency and qualifications of staff physicians for purposes of achieving the highest medical practice standards, patient safety and quality patient care has long been a prerogative of private medical institutions. Using the fruits of peer review activities to assist the Colorado Board of Medical Examiners in the discharge of its licensing and oversight functions does not convert an historically private function into state action. The existence of a nexus between professional review organizations and the Colorado Board of Medical Examiners' disciplinary process does not make the former an instrumentality of the latter.

This Court has established the parameters for determining whether state action exists: "We have held that the question [of state action under § 1983] is whether the function performed has been 'traditionally the *exclusive* prerogative of the State'" [Court's own emphasis]. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842, 102 S.Ct. 2764, 2772, 73 L.Ed.2d 205 (1982). This requirement is reaffirmed in *Blum v. Yaretsky*, 457 U.S. 991, 1011, 102 S.Ct. 2777, 2789 (1982). Case authority is both legion and uniform in holding that, because professional peer review at private hospitals has *not* traditionally been the *exclusive* prerogative of the state, peer review at private hospitals does not constitute state action. *See, e.g., Loh-Seng Yo v. Cibola General Hospital*, 706 F.2d 306, 307-08 (10th Cir. 1983).

Private hospitals have routinely engaged in peer review of their staff physicians for important private reasons. *See, e.g., Shulman v. Washington Hospital Center,*

222 F. Supp. 59, 64 (D.D.C. 1963). Therein the court remarked:

> "Necessarily hospitals endeavor to secure the most competent and experienced staff for their patients. Without regard to the absence of any legal liability, the hospital in admitting a physician or a surgeon to its facilities extends a moral *imprimateur* to him in the eyes of the public. Moreover, not all professional men have a personality that enables them to work at harmony with others, and to inspire confidence in their fellows and in patients. . . . It becomes indispensable, therefore, for every such institution to make choices as to whom it will admit to its portals." [Emphasis in original.]

A private hospital engages in peer review "so that it can have confidence in the competent and moral commitment of its staff." *Sosa v. Managers of Val Verde Memorial Hospital*, 437 F.2d 173, 177 (5th Cir. 1971).

Peer review activities in Colorado have been traditionally private in nature. While the Board of Medical Examiners has historically enjoyed the exclusive authority and responsibility for *licensure* of physicians in the State, professional review activities for purposes of ascertaining physician qualifications and competence to *enjoy hospital privileges* has *never* been exercised by that state agency. As early as 1975, a decade before the enactment of the Health Care Quality Improvement Act, 42 U.S.C. § 11101 *et seq.*, the Colorado Legislature recognized the value of encouraging discipline and control of the practice of health care rendered by physicians in hospitals by committees comprised of their peers. *See* Section 12-43.5-101 C.R.S. (L.75, p. 465, § 1 *repealed*, S.B.261, eff.

July 1, 1989). In fact, nowhere are professional review activities either claimed or exercised by any Colorado state agency. Certainly, then, the Colorado Board of Medical Examiners exercises no "exclusive" control over the private peer review process.

The current Colorado Professional Review Act (Colo.Rev.Stat. § 12-36.5-101 *et seq.*) does not change this historical and traditional deference. Section 12-36.5-103, C.R.S., expresses the intent of the General Assembly that the Board of Medical Examiners *utilize and allow* professional review committees and governing boards to *assist* it. This language does not delegate any authority to private peer review organizations, nor does it abrogate the Board of Medical Examiners' traditional exclusive functions concerning the licensure of physicians in this state.

Creating a statutory scheme whereby private hospitals can review the conduct practiced by its staff physicians and oversee the quality of medical care does not rise to state action just because there is some interrelationship between that private function and state regulatory or investigatory authority. In *Wong v. Tripling*, 881 F.2d 200 (5th Cir. 1989), a physician asserted a § 1983 claim against a private hospital for revocation of his staff privileges, claiming that there was state action because "Mississippi's comprehensive scheme governing the suspension, revocation or restriction of hospital staff privileges creates a program whereby hospitals perform a traditional state function," allegedly a peer review. *Wong*, 881 F.2d at 201-02. The Fifth Circuit affirmed the federal district court's dismissal of the physician's § 1983 claim

for lack of state action, holding that "the hospital's executive committee did not perform a traditional state function in revoking Dr. Wong's staff privileges." Similarly, in *Goss v. Memorial Hospital System*, 789 F.2d 353, 356 (5th Cir. 1986), the Fifth Circuit held that the Texas Medical Practice Act's provisions governing peer review did not create state action for purposes of § 1983. Just like the Colorado statute, the Texas Act "authorizes a medical peer review committee to report its finding of a physician's incompetency to the Texas State Board of Medical Examiners."

In *Tunca v. Lutheran General Hospital*, 844 F.2d 411 (7th Cir. 1988), the Seventh Circuit held that even a comprehensive statutory scheme requiring hospitals to develop procedural guidelines for considering applicants for medical staff privileges does not render the hospital a state actor for purposes of § 1983. The Fourth Circuit held, in affirming the dismissal of a physician's section 1983 claim, that where the state statute did not give a private hospital the authority to revoke a physician's medical license, the statute did not delegate to a private entity "powers exclusively reserved to the State." *Modaber v. Culpeper Memorial Hospital*, 674 F.2d 1023, 1027 (4th Cir. 1982). The Court reasoned:

> "The state does not make a hospital's decision to revoke privileges dispositive of license revocation. *The hospital makes its own decision for its own reasons.* Making it State action merely because it is reported to the medical licensing authority would be just as non-sensical as making a private employer's decision to fire a parolee State action because it is reported to the parole commission. In each case, the reasons for making the

> decision may be totally independent of the state's reason for wanting the information. [Emphasis added.]

Petitioner's interpretation of *Nicholas v. North Colorado Medical Center*, 902 P.2d 462 (Colo. App. 1995), *aff'd sub nom, North Colorado Medical Center v. The Committee on Anticompetitive Conduct*, 914 P.2d 902 (Colo. 1996), is erroneous. First, Petitioner asserts that in *Nicholas* the Court of Appeals determined that when performing peer review activities the governing board is clothed with the status of a state (Petition for Certiorari, at page 11). *Nicholas* specifically did *not* reach that issue. The Court of Appeals expressly declined to decide if North Colorado Medical Center's governing board was a subordinate state agency to the Committee on Anticompetitive Conduct; rather, it upheld the complaining physician's standing to appeal on the alternative ground that C.R.S. § 12-36.5-106 itself expressly permitted the loser in a final administrative action before the Committee on Anticompetitive Conduct to appeal to the Colorado Court of Appeals.[1] The Court of Appeals had an opportunity to revisit its own opinion in *Nicholas* in this case, and it reaffirmed its holding that *Nicholas* is limited to questions of anticompetitive conduct and did not address peer review concerning any other matters, including "whether peer review on other than noncompetitive conduct should be deemed action taken under color of state law

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[1] Significantly, the duties of the Committee of Anticompetitive Conduct, and C.R.S. § 12-36.5-106 under which the *Nicholas* proceeding was brought, solely involve a charge that the peer reviewers' conduct was anti-competitive. Dr. Berg has not alleged any anti-competitive conduct.

for 42 U.S.C. § 1983 actions." (Court of Appeals Opinion, at p. 4.)

Petitioner urges this Court to adopt an absurd statutory construction: Petitioner urges that, in response to a 1988 *antitrust* decision arising in Oregon,[2] the Colorado General Assembly determined to make a wholesale change to the peer review process, erase the historical distinction between private hospitals and public agencies, and declare all peer review activities of a private hospital "state action." Petitioner offers no legislative history or evidence of legislative purpose to support this assertion. But, even if the Colorado Legislature determined to mitigate this Court's opinion in *Patrick v. Burget, supra,* it adopted a more direct approach to insulate private peer review organizations from claims of antitrust, by enacting C.R.S. § 12-36.5-104(14) which declares such peer review organizations not to be unlawful conspiracies. That amendment, coupled with the enactment of the provisions establishing the Committee on Anticompetitive Conduct in § 12-36.5-106, reflects a legislative intent to deal exclusively with antitrust considerations affecting peer review activities, and not with any other traditional private peer review.

Under Petitioner's theory, every single medical staff decision made by a private hospital in Colorado would constitute state action. The General Assembly could not possibly have intended such a radical federalization of peer review at private hospitals when it amended the

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[2] *Patrick v. Burget,* 486 U.S. 94 (1988).

Colorado Professional Review Act to create the Committee on Anti-competitive Conduct. Adopting such interpretation would charge the private sector with state action in the performance of functions historically considered private. *Ward v. St. Anthony Hospital*, 476 F.2d 671, 675 (10th Cir. 1973); *Sokol v. University Hospital, Inc.*, 402 F. Supp. 1029, 1031 (D. Mass. 1975).

In summary, there is no authority to support Petitioner's proposition that the assistance of a private professional review organization to a public agency transforms those activities into state action. The conduct of a professional peer review is not traditionally, historically or exclusively the prerogative of the State of Colorado. The relevant statutes create no substantive participation, supervision, authority or control by the Colorado Board of Medical Examiners into the private, internal functions of peer review organizations sufficient to elevate their conduct into the conduct of the Board of Medical Examiners itself.

B. A private hospital's peer review activities are neither an integral part of the operation of the Colorado Board of Medical Examiners nor indispensable to the discharge of its functions so that the activities assume the character of governmental action.

Petitioner's argument that Respondents' private peer review activities constitute state action has been rejected by virtually every court which has addressed the issue, because medical staff peer review has traditionally and historically been the prerogative of private hospitals and not the exclusive prerogative of the state. Thwarted by

the legion of authority on point against his position, Petitioner attempts to bootstrap his claim into state action by suggesting that Humana's private peer review activities are so entwined and impregnated by state action that they are in fact the actions of the Colorado Board of Medical Examiners under Petitioner's own flawed analysis of this Court's opinion in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

Petitioner's argument is without merit. First, the appropriate test to measure Respondents' conduct, as rightly and consistently held by all courts which have addressed this issue, is whether the conduct complained of has historically been the exclusive prerogative of the state. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). Respondents have shown categorically that it is not. Second, the test enunciated in *Burton* and its progeny deals with circumstances on which the state participates in activities historically private in character. Defining state action in such circumstances requires a determination, considering the aggregate of relevant factors, that the state has so far insinuated itself into an interdependence with private conduct that it has become a joint enterprise compelling the finding of state responsibility for private action. Thus, this Court held in *Burton*, that state action exists in an instance where the land and buildings in question were publicly owned, the property was dedicated to public use, the performance of the parking authority was declared to be an essential state function, and the acquisition, construction and maintenance of the facility were paid for by revenue bonds financed through proceeds from the operation of the facility.

Similarly, in *Evans v. Newton*, 382 U.S. 296 (1966), another case cited by Petitioner, this Court determined that the status of the city as trustee of a private park which was an integral part of the city's activities, maintained by city personnel and funds, and exempted from city taxation, demonstrated a governmental control sufficient to constitute state action. In *West v. Atkins*, 487 U.S. 42 (1988), yet another case cited by Petitioner, this Court held that the actions of private physicians hired by the state of North Carolina to provide medical treatment of inmates of its prisons were agents of the state because (1) the state had a federal constitutional obligation under the Eighth Amendment to provide adequate medical care to those to whom it had incarcerated; (2) the state hired physicians to fulfill its constitutional obligation; (3) inmates must rely solely on those physicians provided by the state for their medical needs; and (4) the physicians function within the state system in rendering medical care and treatment. While the *Burton* analysis may be appropriate to test a single, historically private activity (such as operating a parking garage, or managing a park, or providing medical treatment to inmates), it is inapplicable in circumstances where the totality of private conduct is challenged as state action and where such private conduct has never been the exclusive prerogative of the state.

However, even if the rule in *Burton* and its progeny were applied here, the conduct of Respondents do not constitute state action because the totality of aggregate facts here do not support the finding of an intertwined or symbiotic relationship between private peer review organizations and the Colorado Board of Medical Examiners

so that the former takes on the governmental character of the latter. The fact that the Colorado Peer Review Act declares that private hospitals *may* establish peer review organizations, governed by their own bylaws, and administered by their own internal governing bodies, and the fact that such peer review activities are immunized if they are conducted in accordance with the principles of good faith and procedure, does not constitute the take-over of private peer review by the State of Colorado.

CONCLUSION

Petitioner's argument that the Colorado Peer Review Act converts historically and traditionally private hospital peer review activities into state action is without merit. Peer review activities have been traditionally, historically and exclusively a private function of hospital-governing bodies. They are used, encouraged and even relied upon by the Colorado Board of Medical Examiners. However, that does not convert these private governing boards and private peer review organizations into arms of the state, subjecting every decision they make to

federal civil rights scrutiny. Petitioner's request for a writ of *certiorari* should be denied.

Respectfully submitted,

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